

BEFORE THE
Federal Communications Commission
 WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)

Communications Assistance for Law
Enforcement Act)

) CC Docket No. 97-213

)

)

REPLY COMMENTS
OF PRIMECO PERSONAL COMMUNICATIONS, L.P.

PrimeCo Personal Communications, L.P. ("PrimeCo") hereby submits reply comments in the above-referenced proceeding. As discussed herein, the Federal Bureau of Investigation and U.S. Department of Justice (jointly "FBI/DOJ") have failed to demonstrate that the industry's interim standard does not meet the capability requirements of the Communications Assistance for Law Enforcement Act ("CALEA"), and their petition should thus be rejected and the industry standard affirmed. PrimeCo also agrees with commenters that the Commission must take into account that new entrants will be disproportionately burdened by CALEA implementation.

I. THE RECORD DEMONSTRATES THAT THE PUNCH LIST ITEMS ARE INCONSISTENT WITH CALEA AND THAT FBI/DOJ HAVE FAILED TO DEMONSTRATE THAT THE J-STANDARD IS DEFICIENT

As PrimeCo demonstrated in its comments, the industry's interim standard, J-STD-025 (the "J-Standard") is presumptively compliant with CALEA's capability assistance requirements, and CALEA places the burden of demonstrating that

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the J-Standard is deficient on petitioner FBI/DOJ.¹ Numerous commenters have demonstrated that FBI/DOJ have failed to show that their requested punch list items are consistent with CALEA.² Equally important, FBI/DOJ have failed to demonstrate that the J-Standard is in any way deficient, and the Commission must therefore deny the FBI/DOJ Petition in its entirety.

CALEA mandates that technical standards and requirements be cost effective, minimize the cost of compliance on residential ratepayers, and not discourage the provision of new technologies and services to the public.³ FBI/DOJ's filings reflect a troubling indifference to these requirements. In its Petition, FBI/DOJ contend that "industry has not identified less expensive means of obtaining the results that law enforcement believes to be required by CALEA" and that "[a] precise assessment of the cost-effectiveness of the proposed rule depends in part on cost information that industry, rather than law enforcement, possesses."⁴ FBI/DOJ's statement here is hard to fathom. PrimeCo understands — and commenters have pointed out — that the FBI has been given cost data from vendors.⁵ Carriers, however, have not been given such data, and PrimeCo agrees that the Commission should require FBI/DOJ to provide this cost data

¹ PrimeCo Comments at 5-8; *see also* AirTouch Comments at 8-9; SBC Comments at 6; U S WEST Comments at 11-12.

² *See, e.g.*, AirTouch Comments at 8-26; AT&T Comments at 4-14; CTIA Comments at 9-17; SBC Comments at 6-14; USTA Comments at 4-8; U S WEST Comments at 12-25.

³ *See* 47 U.S.C. § 1006(b).

⁴ FBI/DOJ Petition for Rulemaking, at 59-60.

⁵ *See* AirTouch Comments at 4-5, n.18; U S WEST Comments at 22.

information (on a non-vendor specific basis) for the record and for public comment.⁶ Moreover, despite the absence of specific data, industry commenters have indicated that implementing the punch list items will be expensive and time-consuming and thus FBI/DOJ's conclusory statements prove nothing.⁷ In addition, the issue is not whether industry has "identified less expensive means" of providing these capabilities but, rather, whether these capabilities are required by CALEA *in the first place*.

As a related matter, FBI/DOJ has failed in its Petition and in its comments to address the technical feasibility of its punch list items. In its Petition, FBI/DOJ state in conclusory fashion that "law enforcement simply seeks access to information that the carrier necessarily processes and maintains" and "is simply asking carriers to transmit to law enforcement information that carriers' software is already fully capable of delivering to the carriers themselves or transmitting to their subscribers."⁸ However, industry commenters have demonstrated that law enforcement is requesting *far more* than what industry is presently capable of providing.

Indeed, in at least one instance, the FBI tacitly acknowledges the overbreadth of the assertion made in its Petition. Regarding post-cut-through dialing, FBI/DOJ acknowledge that carriers "*currently lack the technical capability* to distinguish post-cut-through dialing that is used to complete a call from post-cut-through dialing that

⁶ See AirTouch Comments at 5; Nextel at 4 n.6.

⁷ See AirTouch Comments at 9; BellSouth Comments at 5; PrimeCo Comments at 10, 13; Sprint PCS Comments at 6; TIA Comments at 71.

⁸ FBI/DOJ Petition at 60-61 (emphases added).

is used for other purposes.”⁹ Thus, by definition, this capability does not maintain the *status quo* with regard to law enforcement capabilities, as CALEA requires.¹⁰ Further, FBI/DOJ simply “*endorse the development* of such capability” without any discussion of whether (again, as CALEA expressly requires) such capability is “reasonably available to the carrier.”¹¹ As numerous industry commenters demonstrated, the development of such a capability will be extremely difficult — and costly.

FBI/DOJ take the position that carriers must make call-identifying information available to law enforcement even if they do not collect the data today because they have no business reason for doing so.¹² FBI/DOJ are mistaken. If carriers have no business reason to collect certain data, it necessarily follows that the collection of this data and its provision to law enforcement is not reasonably available to a carrier.¹³ It is important to emphasize that CALEA requires carriers to provide to law enforcement only that call-identifying information that is “*reasonably available* to a carrier.”¹⁴

⁹ FBI/DOJ Comments at 11 n.2 (emphasis added).

¹⁰ See H.R. Rep. No. 103-827, at 22-23 (1994).

¹¹ See FBI/DOJ Comments at 10-11, n.2.

¹² FBI/DOJ Comments at 10 ¶ 16.

¹³ A simple example makes the point. Assume the FBI wanted to learn whether the target’s telephone call was attempted by a rotary dial or touchtone telephone. This information has no relevance to the provision of service, so carriers generally have not equipped their networks to record this fact. By definition then, for these carriers, it cannot be said that this rotary dial/touchtone information is “reasonably available to the carrier.”

¹⁴ 47 U.S.C. § 1002(a)(2)(emphasis added).

FBI/DOJ also fail to explain their need for some requested data. For example, law enforcement wants to receive network-generated signal messages, such as ringing or busy signals, claiming that such information has “evidentiary significance to law enforcement.”¹⁵ Putting aside the fact that ring back tones do not fall within the statutory definition of call-identifying information,¹⁶ PrimeCo questions whether a ring back tone would provide useful information to law enforcement in any event. The receipt of a ring back tone in a call attempt to a CMRS subscriber may indicate that the subscriber is using his or her handset or is in an area or condition that affects call completion. A ring back tone is also generated when the subscriber has turned off his or her handset. Thus, law enforcement can reach no conclusions about the significance of ring back tones on calls to CMRS subscribers.

Similarly, regarding feature status information, FBI/DOJ assert, without explanation, that this punch list item “represents the most appropriate way to ‘meet the assistance capability requirements of section 103 by cost-effective methods.’”¹⁷ The FBI’s unsupported presumption that its requested capability is “cost-effective” is not supported by the record in this proceeding.¹⁸ As demonstrated in PrimeCo’s comments,

¹⁵ FBI/DOJ Petition for Rulemaking, at 45 ¶ 80.

¹⁶ CALEA defines call-identifying information as “dialing or signaling information that identifies the origin, direction, destination, or termination of each communication.” 47 U.S.C. § 1001(2). A ring back tone does not identify the “origin, direction, destination or termination” of a communication.

¹⁷ *See id.* at 14 (citing 47 U.S.C. § 1006(b)(1)).

¹⁸ As noted earlier, the FBI has access to this cost data, and carriers do not. In any event, the record in this proceeding *does not* support the FBI’s claim.

existing methods of providing this information are consistent with CALEA's requirements and real time notification is unnecessary.¹⁹ Furthermore, as TIA explains:

If carriers were required to provide feature status messages at the time that the subscriber submits a request, carriers would have to reconfigure entire customer service databases and other operating software to provide automatic messaging to law enforcement — a capability that is not even remotely supported by the present design of these systems.²⁰

In sum, the FBI's conclusory statements regarding cost-effectiveness and technical feasibility are unsupported by record information.

II. THE FBI'S CARRIER REIMBURSEMENT SCHEME VIRTUALLY ENSURES THAT PUNCH LIST ITEMS ARE NOT COST-EFFECTIVE AND WILL DISCOURAGE NEW TECHNOLOGIES

PrimeCo agrees with commenters Nextel and Sprint PCS that, in reviewing the FBI/DOJ Petition, the Commission must take notice that the FBI's present scheme for carrier reimbursement will impose a disproportionate burden of the costs associated with implementing the capability assistance requirements on new wireless entrants.²¹ CALEA requires that Commission action regarding technical requirements or standards be "cost-effective" and "encourage the provision of new technologies and services to the public."²² PrimeCo submits that the Commission cannot adopt rules consistent with this

¹⁹ See PrimeCo Comments at 20-21.

²⁰ TIA Comments at 71.

²¹ See Nextel Comments at 6-7; Sprint PCS Comments at 4-5.

²² See 47 U.S.C. § 1006(b)(1), (4).

requirement without accounting for the detrimental impact of the FBI's cost recovery rules on new market entrants.

The FBI's cost recovery rules restrict carrier reimbursement for modification of equipment, facilities, and services installed or deployed on or before January 1, 1995 by defining "installed or deployed" as "on a specific switching system, equipment facilities, or services are operable and available for use by the carrier's customers."²³ For broadband PCS licensees such as PrimeCo, who were not even authorized to provide service until after mid-1995, and other new market entrants, the FBI's current interpretation of CALEA would appear to preclude *the* possibility of government reimbursement for CALEA-mandated capability modifications. Thus, should the Commission impose the FBI/DOJ punch list items on carriers, the costs of making necessary upgrades and modifications for CALEA compliance will increase significantly.²⁴ While incumbent carriers may be eligible for reimbursement for some of these increased costs, under the FBI's present reimbursement scheme new market entrants will not. Indeed, given the costs associated with punch list implementation generally, coupled with the

²³ 28 C.F.R. § 100.10. After the Commission released its April 20, 1998 Public Notice seeking public comment on the various CALEA petitions, the FBI rejected industry's position that "deployed" should mean "commercially available prior to January 1, 1995." See 63 Fed. Reg. 23,231, 23,234. The FBI's rule has been challenged in Federal district court. *Cellular Telecommunications Industry Ass'n v. Reno et al.*, Case No. 1:98CV01036 (D.D.C. filed April 27, 1998).

²⁴ See, e.g., AirTouch Comments at 9, TIA Comments at 71.

disproportionate cost implementation burden new entrants will face, the Commission should expect a wave of Section 109(b) "reasonably achievable" petitions.²⁵

CONCLUSION

The record in this proceeding demonstrates that the Commission must reject the FBI/DOJ Petition for Rulemaking. In addition, the FBI's cost recovery rules virtually ensure that imposing punch list items on carriers will contravene CALEA's mandate that standards and technical requirements be cost-effective and not discourage new technologies.

Respectfully submitted,

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June 12, 1998

²⁵ See 47 U.S.C. § 1008(b); BellSouth Comments at 3 n.3.

CERTIFICATE OF SERVICE

I, Shelia L. Smith, hereby certify that I have on this 12th day of June, 1998 caused a copy of the foregoing Reply Comments to be served by first class U.S. mail, postage prepaid, to the following:

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